

Supreme Court, U. S.

FILED

JUL 15 1976

MICHAEL RODAK, JR., CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975

No. 75-1522

---

SANDRA KANTROWITZ, PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF  
HEALTH, EDUCATION, AND WELFARE

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

REPLY BRIEF

---

JONATHAN A. WEISS  
Counsel for Petitioner  
2095 Broadway, Room 304  
New York, New York 10023  
(212) 595-1340

# INDEX

	<u>Page</u>
ARGUMENT	1
CONCLUSION	7
APPENDIX A	A-1
APPENDIX B	B-1

## TABLE OF AUTHORITIES

	<u>Page</u>
Dandridge v. Williams, 397 U.S. 471 (1970).....	6
Edelman v. Jordan, 445 U.S. 651 (1974)..	5
Fleming v. Nestor, 363 U.S. 603 (1960)..	6
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).....	4
Murgia v. Commonwealth, 44 U.S.L.W. 5077 (1976).....	5
Sherbert v. Verner, 374 U.S. 398.....	4
Valencia v. Bateman- 323 F.Supp. 60 (D.C. Ariz. 1971).....	3

## ARGUMENT

Petitioner believes that the invidious discrimination of Title XIX of the Social Security Act is apparent. The classification employed in this statutory scheme is irrational and promotes neither actual nor conceivable objectives within the scope of federal legislative power. To observe the classification is to discern its irrationality.

Petitioner's affirmative case is set forth in her Petition for a Writ of Certiorari. Rather than reiterate those arguments, petitioner would like only to clarify certain misleading statements expressed in Respondent's brief. For purposes of efficiency, these points are itemized.

(1) On page 5, footnote 3, Respondent insinuates that there is a misstatement of the classification. Petitioner attaches the Senate Report which Respondent cites for this proposition (see Petitioner's Appendix A). The

report, in fact, specifies that the classification is the exact one defined by the statute. The exclusionary class violates the Constitution and is defined properly by Petitioner.

(2) In footnote 5, Respondent asserts that "[T]he propriety of that denial [of injunctive relief] is not properly presented to this Court." Contrary to Respondent's assertion, the three-judge district court, specifically stated that the matter was appropriately appealed to the District of Columbia Court of Appeals (on the assumption that declaratory relief would be sufficient; Petitioner's Brief for Certiorari at A-23). Citing Wright and Miller at oral argument, the District of Columbia Court of Appeals agreed, and a Protective Notice of Appeals, specifically so labeled for this Court, was timely filed. Therefore, all issues are presented to this Court.

(3) In footnote 6, Respondent states,

"She [Petitioner] would equally have been denied reimbursement if the treatment had been provided in a New York facility." This proposition misses the point. The contours of freedom of association and travel are not confined to principles of interstate movement. The right of intrastate travel is constitutionally protected, as well. See e.g., Valencia v. Bateman, 323 F.Supp. 60 (D.C. Ariz. 1971). Petitioner was dissatisfied with the method of treatment she was receiving in New York State. She chose to travel to Pennsylvania for the purposes of obtaining a different type of therapy (a type of therapy, in fact, which, itself, has undertones of constitutionally protected group association). Under established constitutional principles, the federal government may no more dictate to Petitioner where she can receive treatment as tell her what kinds of treatment are permissible (see cases cited in Petitioner's Brief for a Writ

of Certiorari at page 20). She must be free to associate where and when she chooses and for whatever reasons.

The elements in the present case are clearly reflected in Memorial Hospital v. Mari-copa County, 415 U.S. 250 (1974), and the logic of that decision should apply.

(4) Respondent also states in footnote 6 that restricted benefits do not infringe on Petitioner's choice of physician. The record in this case convincingly belies that assertion. Respondent's refusal to reimburse is directly related to Petitioner's inability to continue with her present medical treatment. The situation in this case parallels Sherbert v. Verner, 374 U.S. 398, where this Court found that withholding of unemployment compensation on account of Appellant's religious principles represented infringement by the state of constitutional rights of free exercise. To deny payment is to deny treatment.

(5) On page 8, Respondent states that "Congress was aware that the states had traditionally accepted responsibility for the care of the mentally ill, and it reasonably determined not to use federal funds merely to displace that health care delivery system." Even assuming this misstatement were true, which it is not (see Petitioner's Appendix B), the fact is that Congress has chosen to act in the health care delivery area and therefore must do so in a constitutional fashion.

(6) On page 10, Respondent states that the "Court's summary affirmance in Legion ... is a binding precedent." This argument is patently wrong. The Supreme Court is never foreclosed from reviewing cases, the facts of which have previously been decided by summary affirmance. See Edelman v. Jordan, 415 U.S. 651, 676-677 (1974); Murgia v. Commonwealth, 44 USLW 5077, fn. 1.

(7) In footnote 8, page 10, Respondent

argues that "the state did not contend that the age classification bore any rational relation to the objective of the state in Montoroula v. Parry." The courts are obligated to seek any rational justification, and the state presented argument in this context. Cf. Fleming v. Nestor, 363 U.S. 603 (1960); Dandridge v. Williams, 397 U.S. 471 (1970). No justification could be found there or here.

(8) Once again, on page 10, Respondent urges the government to take "one step" at a time. However, the freedom to proceed by increments is not a license to discriminate. This is especially true when, as in the instant case, classifications are based on totally irrelevant secondary characteristics and in a crucial and constitutional domain. The government has created a program of medical assistance to inpatients in mental hospitals. The creation of that program was the "step" taken by Congress. Within that otherwise

uniform program, it cannot constitutionally arbitrarily exclude persons of a certain age in a certain institution.

#### CONCLUSION

For the reasons set forth above and in the petition filed herein, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

JONATHAN A. WEISS  
Legal Services for the  
Elderly Poor  
2095 Broadway, Room 304  
New York, New York 10023  
(212) 595-1340

JOHN C. GRAY, JR.  
Brooklyn Legal Services,  
Corp B  
152 Court Street  
Brooklyn, New York 11201  
(212) 855-8003

Counsel for Petitioner

#### APPENDIX A

SENATE REPORT NO. 92-1230,  
92d CONG., 2d SESSION 280-281, 1972

#### MEDICAID COVERAGE OF MENTALLY ILL CHILDREN

(Sec. 299B of the Bill)

Under present medicaid law, reimbursement for inpatient care of individuals in institutions for mental diseases is limited to those otherwise eligible individuals who are 65 years of age or older.

Matching for outpatient care for mentally ill children, as well as needy adults, is currently available under Title XIX. The committee supports use of these funds where appropriate, and believes that outpatient treatment in the patient's own community should be used wherever possible. However, in some cases, inpatient care in an institution for mental diseases is necessary.

The committee amendment would there-

fore authorize Federal matching under medicaid for eligible children, age 21 or under, receiving active care and treatment for mental diseases in an accredited medical institution. The definitions of active care and treatment in accredited mental institutions are those applicable to psychiatric institutional care under the medicare program. An appropriate "maintenance of effort" provision is included to assure that the new Federal dollars are utilized to improve and expand treatment of mentally ill children.

The committee believes that the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constructive citizens.

The committee also believes that the potential social and economic benefits of ex-

tending medicaid inpatient mental hospital coverage to mentally ill persons between the ages of 21 and 65 deserves to be evaluated and has therefore authorized demonstration projects for this purpose.

The amendment is effective January 1, 1973.

APPENDIX B

UNITED STATES COURT OF APPEALS,  
FOR THE DISTRICT OF COLUMBIA

APPELLANTS BRIEF AT PAGE 21

Accepting arguendo the proposition that care of the mentally ill in state hospitals is the responsibility of the states, that justification might support a total exclusion of such institutions from federal medical assistance, as was true prior to 1965, but certainly cannot support a system of federal grants to a selected group in precisely those state institutions. The only rational exclusion based on an assertion of state responsibility for mental disease and tuberculosis hospitals would be the total exclusion of all such institutions from coverage, as was recognized by the King-Anderson bill (see, discussion in Hearings on Medical Care for the Aged Amendments, Senate Finance Committee, 88th Congress, 2d Session [1964] at 108-109).

B-2

Furthermore, the federal government participates in funding public and private psychiatric hospitals through a variety of other federal programs such as Hill-Burton and hospital improvement grants. See statement of Dr. Leonard Ganser, Hearings on H.R. 12080, Sen. Finance Comm., 90th Cong., 1st Session 1749 (1967). To assert that the federal government should not allow Medicaid assistance to patients in mental disease institutions because such institutions are the responsibility of the state governments is totally irrational in face of the extensiveness of federal aid to these institutions.\*

---

\*If Congress is concerned that increased federal assistance for patients in mental disease or tuberculosis institutions will result in less state assistance for the same patients and thus no net gain, there is a proven statutory device to meet this problem. To alleviate their concern that states might abandon or reduce their assistance to the mentally ill in the wake of the Medicaid program, Congress required, as a condition of receiving federal

---

money, that states increase their expenditures to mental institutions. P.L. 89-97 §1903(b). Recognizing that this requirement had succeeded in maintaining state mental hospital expenditures, Congress recently deleted this mandate. P.L. 92-603; Sen. Rep. No. 1230, 92d Cong., 2d Sess. 323 (1972).